United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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UNDERHILL CONSTRUCTION CORPORATION,
Petitioner,

against

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITIONER'S BRIEF

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Question Presented

Whether contractor's activities on subject construction project are exempt from the application of standards adopted by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970.

Statement of the Case

This case is before the Court pursuant to Section 11(a) of the Occupational Safety and Health Act of 1970 (the "Act") (84 Stat. 1590, 29 U.S.C. 651 *et seq.*) on petition of Underhill Construction Corporation to review an order of the Occupational Safety and Health Review Commission

(the "Commission") issued January 31, 1975 (A. 37). This Court has jurisdiction under 29 U.S.C. 660(a), the alleged safety violations having occurred in New York County, New York.

Statement of Facts

The case arises out of a contested citation for an alleged serious violation of the Act by petitioner and four uncontested non-serious violations (A. 4).

The administrative law judge, Joseph L. Chalk concluded that both citations were void as a matter of law in view of the effective date provisions of 29 C.F.R. 1926.1050 since petitioner's contract for construction was negotiated prior to April 27, 1971. Accordingly he vacated both citations without reviewing their merits (A. 27).

Section 29 C.F.R. 1926.1050* is in Subpart X of the Construction Safety Standards and was promulgated by the respondent, Secretary of Labor (the "respondent") pursuant to the authority granted him by Section 107 of the Contract Work Hours and Safety Standards Act (the "Construction Safety Act") (40 U.S.C. 327 *et seq.*).

29 C.F.R. 1926.1050 provides as follows:

> Except where different effective dates are specifically provided in § 1926.1051, the safety and health standards published in Subparts C through U of this part shall become effective on April 24, 1971, for all Federal and federally assisted advertised contracts subject thereto which are advertised after that date and on April 27, 1971, for all such negotiated contracts for which negotiations begin after that date.

On May 29, 1971, respondent promulgated 29 C.F.R. Part 1910 pursuant to the authority granted to him by Section 6(a) of the Act.

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* Originally published as 29 C.F.R. Part 1518 (36 F.R. 7340).

Subpart B thereof adopted the standards prescribed in Part 1518 [now Part 1926] of 29 C.F.R. as occupational safety and health standards under section 6 of the Act (29 C.F.R. 1910.12(a)).

Subsequently, 29 C.F.R. 1910.12 was amended by adding paragraph c which states:

> (c) Construction Safety Act distinguished. This section adopts as occupational safety and health standards under section 6 of the Act the standards which are prescribed in Part 1926 of this chapter. Thus, the standards (substantive rules) published in Subpart C and the following subparts of Part 1926 of this chapter are applied. This section does not incorporate Subparts A and B of Part 1926 of this chapter. Subparts A and B have pertinence only to the application of section 107 of the Contract Work Hours and Safety Standards Act (the Construction Safety Act). For example, the interpretation of the term "subcontractor" in paragraph (c) of § 1926.13 of this chapter is significant in discerning the coverage of the Construction Safety Act and duties thereunder. However, the term "subcontractor" has no significance in the application of the Act which was enacted under the Commerce Clause and which establishes duties for "employers" which are not dependent for their application upon any contractual relationship with the Federal Government or upon any form of Federal financial assistance.

POINT I

The wording of 29 C.F.R. 1926.1050 is clear and unambiguous and must be applied in favor of respondent.

29 C.F.R. 1926.1050 clearly states that its provisions became effective on April 24, 1971, for all negotiated contracts for which negotiations began after that date. The

administrative law judge below stated:

> In light of the fact this paragraph was not excluded by the adopting regulation, 29 C.F.R. 1910.12, I have concluded that it must be applied to the Safety and Health Act (*Posados* v. *National City Bank of New York,* 296 U.S. 497, 56 S.Ct. 349 (1936); *Jones* v. *Alfred H. Mayer Company,* 392 U.S. 409, 88A S.Ct. 218 (1968). This conclusion also accords with the usual rule of statutory construction that clear and unambiguous language found in a statute shall be given its ordinary meaning, rather than be distorted so as to defeat the intent and purpose of the enacting body (*United States* v. *Rice,* 327 U.S. 742, 66 S.Ct. 835 (1946); *United States* v. *State of California,* 297 U.S. 175, 56 S.Ct. 421 (1936); *Rucker* v. *Wabash Railroad Company,* 417 F.2d 146 (7th Cir., 1969)). (A. 30).

29 C.F.R. 1910.12, on its face, clearly expresses the intent of the respondent to adopt 29 C.F.R. 1926.1050.

POINT II

The respondent's adoption of 29 C.F.R. 1926.1050 was intentional and within his authority.

A. It is apparent that the respondent's adoption of 29 C.F.R. 1926.1050 was deliberate and intentional and well within the authority granted him by Congress.

The Act declared that standards issued under certain laws, in effect on or after the effective date of the Act shall be deemed to be the standards issued under the Act (29 U.S.C. § 653(b)(2)). The Construction Safety Act among other laws was specified. Therefore by Act of Congress 29 C.F.R. 1926.1050 was declared to be a standard under the Act. The Secretary could modify or revoke that standard pursuant to 29 U.S.C. § 655(b)(2)).

However, to date the respondent has chosen not to do so, but instead, has reaffirmed it as a standard.

The Construction Safety Act granted the respondent the authority to provide such reasonable limitations and make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of that act as he may find necessary and proper in the public interest to prevent injustice and undue hardship (40 U.S.C. 331).

In the preamble for 29 C.F.R. Part 1518 (the predecessor to Part 1926) published on April 17, 1971, respondent stated:

> The rules are applied only to new construction contracts which are advertised on or after the seventh day following publication of this document in the Federal Register. In the case of negotiated construction contracts, the rules shall be effective as to new contracts of this nature for which negotiations are commenced on or after 10 days following publication of this document in the Federal Register. The time lag in the procurement process, together with the time periods specified, are considered sufficient to afford affected persons reasonable time to take such action as may be necessary to comply with the rules.

In carrying out this expressed intention, respondent promulgated Subpart X, 29 C.F.R. 1518.1050.

Thus, the respondent clearly stated that the exemption contained in 29 C.F.R. 1518.1050 was promulgated to provide a time period of sufficient duration to afford affected persons a reasonable time to take such action as might be necessary to comply with the rules. Accordingly, the standards were not to apply to new construction contracts for which negotiations began were commenced on or after 10 days after the publishing of 29 C.F.R. Part 1518.

This rationale was reaffirmed when the respondent promulgated 29 C.F.R. 1910.12.

B. The respondent has urged before the Commission that by 29 C.F.R. 1910.12 he adopted only the substantive provisions of 29 C.F.R. Part 1926 and not the provisions restricting its applicability. There is no authority or basis for this distinction.

When Part 1518 was republished as Part 1926, the respondent stated in the preamble to Part 1926:

> Since this revision does not make any substantive changes in the standards, it is not necessary to provide notice of proposed rule making, opportunity for public participation therein, nor any delay in effective date. For the same reason, good cause is found for not following the regular procedure for rule making provided in 5 U.S.C. 553, and for making this revision effective immediately.

The respondent included a similar statement in the preamble to Part 1910.

The respondent thereby avoided the publishing requirements of the Act (Section 6(b)(2)) by claiming that Part 1926 and Part 1910 did not include substantive changes.

The United States Supreme Court has stated that a limitation period fixed by Congress with respect to a newly created cause of action constitutes a "'material element in [a] uniformity of operation' which Congress could not wish 'to be destroyed. . . .'" *Burnett* v. *New York Central Rlrd. Co.*, 380 U.S. 424, 85 S.Ct. 1050 (1965); *Izquierdo* v. *Cities Service Oil Co.*, 47 Misc.2d 1087, 264 N.Y.S.2d 58 (Sup. 1965); 16 A.L.R.3d 637, 659-660. If the time to sue is material to a statute in which it is contained, it would seem that an exemption from the statute or regulation would be even more material. More-

over, implied repeal of 29 C.F.R. 1926.1050 would interfere with the operation of the standards as expressed in the preamble of 29 C.F.R. Part 1518.

The distinction between "substance" and "procedure", which has been frequently defined in the context of choice of law issues in the federal courts, also supports petitioner's position that 29 C.F.R. 1926.1050 is a substantive rule. As stated in *Maryland Casualty Co.* v. *Williams*, 377 F.2d 389, 393 (5th Cir. 1967):

> Substantive [in the context of applying state or federal law] means that the state law applicable to the issue or issues of the suit would significantly affect the outcome of the suit. If so, the federal court must apply the applicable state law on these issues, *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109, 65 S.Ct. 1464 (1945).

29 C.F.R. 1926.1050 is clearly substantive according to this test. One result will occur if that section is applied, an opposite result if that section is not applied.

Although the respondent has the authority under the Act to grant further exemption (29 U.S.C. § 655(e)) or modify or revoke any standard (29 U.S.C. § 655(b)) by following the procedures specifically outlined therein, he has not done so.

In essence, therefore, the respondent, when he adopted Part 1926 as the standard for the Act, impliedly repealed 29 C.F.R. 1926.1050.

The Supreme Court stated in *Jones* v. *Mayer Co.*, 392 U.S. 409, 437, 88 S.Ct. 2186: " 'The cardinal rule is that repeals by implication are not favored' 'citing *Posados* v. *National City Bank*, 296 U.S. 497, 56 S.Ct. 336.' "

C. In promulgating Part 1910, the respondent carefully distinguished which subparts of Part 1926 were not adopted by him. The administrative law judge, found the exclusion

of subparts A and B of Part 1926, but not subpart X, to be very significant. He said:

> It is important to note, too, that while 29 C.F.R. 1910.12 specifically excludes the first two subparts, A and B, of the adopted standards, for the stated reason that they "have pertinence" only to "the Construction Safety Act," no other exclusions are mentioned. The effect of this exclusion factor *vis-a-vis* the non-exclusion factor must be considered highly significant (*Posados* v. *National City Bank of New York, supra; Jones* v. *Alfred H. Mayer Company, supra*). (A. 29).

D. Accordingly, the exemption originally promulgated by the Secretary in 29 C.F.R. 1518.1050 which subsequently became 29 C.F.R. 1926.1050 was adopted by Congress as a standard under the Act and remains so. The Secretary having adopted Part 1926 as applicable to contracts subject to the Act and having failed to subsequently properly modify or delete such standard, it is presently valid and effective.

POINT III

The Commission's decision ignores clear language of 29 C.F.R. 1910.

The Commission in its decision stated as follows:

> Underhill's argument must fail because it ignores the fact that only "established Federal standards" are adopted and promulgated by Subpart B of Part 1910. The term "established Federal standard" is a term of art and is defined in section 3(10) of OSHA as meaning "any operative occupational safety and health standard established and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act." Likewise, the term "occupational safety and health standard" is a term of art.

> It is defined by section 2(8) as meaning "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (A. 40).

The Commission then concluded that under these definitions that 29 C.F.R. 1926.1050 is not an occupational safety and health standard.

The Commission failed to consider that subpart A of Part 1910 defines "established Federal standard" as "any operative standard established by any agency of the United States and in effect on April 28, 1971 or contained in any Act of Congress in force on the date of enactment of the Williams-Steiger Occupational Safety and Health Act" (29 C.F.R. 1910.2(h)).

Thus, the respondent by its own definition defined "established Federal standard" to mean something other than what was defined under the Act.

The term "operative" as used by the respondent in 29 C.F.R. 1910.2(h) clearly indicates an intent to adopt a standard in effect on April 28, 1971 that was still *operative* in October 1972 when 29 C.F.R. 1910 was published.

Under this reasonable construction the Commission's decision must fail.

POINT IV

Since, the Act is penal in nature, 29 C.F.R. 1926.1050 must be interpreted in favor of those who may be penalized in the event it is determined an ambiguity exists.

It is petitioner's position that 29 C.F.R. 1926.1050 clearly and unamibguously exempts the subject contract from the provision of Part 1926. However, if this Court determines that an ambiguity does exist, it is respectfully submitted that the ambiguity must be resolved in favor of the respondent.

The Act is penal in nature. It expressly provides for "penalties" (Section 17). If imposed, the penalties apply to prior conduct and are designed to deter similar conduct in the future.

Ambiguities in penal statutes or regulations must be construed in favor of those who may be penalized. *United States* v. *Bass,* 404 U.S. 336 (1971); *Rewis* v. *United States,* 401 U.S. 808 (1971); *Toussie* v. *United States,* 397 U.S. 112 (1970); *United States* v. *Boston & Maine R.R.,* 380 U.S. 157 (1965). As the majority said in *United States* v. *Bass, supra,* 404 U.S. 347, 348:

> First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 . . . (1952). This principle is founded on . . . policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world

> will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 25, 27 . . . (1931) (Holmes, J.)

In *United States* v. *Boston & Maine R.R., supra,* 380 U.S. 160, the court said:

> A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from *United States* v. *Wiltberger,* 5 Wheat 76, 5 L.Ed. 37, down to this day. Chief Justice Marshall said in that case:
>
> "The rule that penal laws are to be construed strictly, is, perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that power of punishment is vested in the legislative, not in the judicial department." *Id.,* p. 95, 5 L.E. 42.

A statute or regulation which imposes only monetary penalties is considered the type of penalty statute which must be strictly construed, even though no imprisonment may result. *United States* v. *Futura, Inc.,* 339 F.Supp. 162 (N.D. Fla. 1972); *Simmons* v. *Continental Casualty Co.,* 285 F.Supp. 997 (N.D. Neb. 1968), *aff'd.* 410 F.2d 881 (8th Cir. 1969); *United States* v. *Krapf,* 180 F.Supp. 886 (D.C. N.J. 1960), *aff'd.* 285 F.2d 647 (3rd Cir. 1961). As the court said in *United States* v. *Futura, Inc., supra,* 339 F.Supp. 165, with respect to a violation of section 204 of the Economic Stabilization Act, 12 U.S.C.A. 1904 *et seq.,*

> The courts have uniformly held that if punishment in the form of a fine is imposed for violation of the statute, as distinguished from a civil remedy, the offense is criminal in nature. *United States* v. *Krapf,* [*supra*].

Consequently, Part 1926 must be construed in favor of those who may be penalized by its application, and 29 C.F.R. 1926.1050 must be given effect to exempt contracts negotiated prior to the dates set forth therein.

Conclusion

The order of the Commission should be reversed and the decision of the administrative law judge holding the subject contract exempt under 29 C.F.R. 1926.1050 should be affirmed.

Dated: June 6, 1975.

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
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UNITED STATES COURT OF APPEALS
~~FOR THE SECOND CIRCUIT~~

UNDERHILL CONSTRUCTION CORPORATION,

Petitioner,

against

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 11th day of June, 1975, he served two copies of the Petitioner's Brief on Michael H. Levin, Esq. Counsel for Appellate Litigation and on William S. McLaughlin, Executive Secretary, OSHRC the attorneys for the Respondents by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. U.S. Dept. of Labor, Rm. S4004, 200 Constitution Ave. N.W. and 1825 K St., N.W. Wash. D.C. ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
11th day of June, 1975.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976